No. 83-1993 (2)

Office-Supreme Court, U.S.
FILED
JUL 24 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN E. LANE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks review of the denial of his request for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d).

1. Petitioner, in his capacity as representative of the estate of G. Kendrick Strong, filed this action in the United States District Court for the District of Massachusetts against the United States, the Secretary of the Treasury, and various officials of the Internal Revenue Service. Petitioner sought equitable relief in the nature of mandamus to require the government to honor his election to pay federal estate taxes in installments, as provided by Section 6166 of the Internal Revenue Code of 1954 (26 U.S.C.).[1] Pet. App.

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[1]26 U.S.C. 6166 provides, in general, that when the value of the decedent's interest in a closely held business exceeds 65% of the value of the adjusted gross estate, the executor may elect to pay part or all of the estate tax in two or more (but not exceeding 10) installments over a maximum 15-year period.

A2-A3. The district court dismissed the suit for lack of jurisdiction, holding that the tax anti-injunction statute, 26 U.S.C. 7421(a), barred petitioner's request for such relief (Pet. App. A12-A16). While petitioner's appeal from that dismissal was pending, the IRS, upon review of a deposition taken by the government in the course of discovery, agreed to allow the estate taxes to be paid in installments. The government thereupon moved the court of appeals to dismiss petitioner's appeal as moot. The court of appeals agreed that the action was moot and remanded the case "without prejudice to any application [petitioner] may submit * * * for attorneys fees" (*id.* at A17).

On remand, the district court denied petitioner's request for attorney's fees, holding that EAJA requires, as a condition precedent to the award of fees, that the court have jurisdiction over the original action (Pet. App. A9). Because the anti-injunction statute barred petitioner's suit, the district court held that it was without authority to award attorney's fees (*id.* at A11). The court of appeals affirmed (*id.* at A1-A6).

2. a. The courts below correctly held that EAJA requires that a court have jurisdiction over the underlying action before attorney's fees may be awarded. The statute provides that a court may award fees only in a "civil action * * * brought by or against the United States *in any court having jurisdiction of that action*" (28 U.S.C. 2412(d)(1)(A) (emphasis added)). Thus, the statutory authorization for attorney's fees simply does not extend to suits over which the court lacks subject matter jurisdiction. Moreover, the plain language of the statute is in accord with the common sense notion that Congress could not have intended to encourage the filing of jurisdictionally-defective lawsuits. While EAJA's primary purpose was to remove financial obstacles to the filing of well-founded civil suits (see 5 U.S.C. 504 note), that purpose can have no application where, as here,

a court finds that it lacked jurisdiction to consider the suit. If litigants are not entitled to an adjudication of their claim by the district court, EAJA should not be interpreted to encourage them to make such a claim.

b. The courts below also correctly decided that the anti-injunction statute deprived the district court of jurisdiction over petitioner's suit.[2] As the Court noted in *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962), the effect of 26 U.S.C. 7421(a) is "to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." The statute thus serves to limit the scope of the jurisdiction otherwise conferred on the district courts under general jurisdictional provisions such as 28 U.S.C. 1331.

Petitioner's action does not fit into the narrow exception to the tax anti-injunction statute recognized by the Court in *Williams Packing*. The Court there held that the bar of Section 7421(a) was absolute unless a showing is made that (1) under no circumstances could the government prevail, and (2) the taxpayer would suffer irreparable injury for which there is no legal remedy (370 U.S. at 6-7).[3] Taking the

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[2]Petitioner misunderstands the import of the order of the court of appeals on the first appeal, which vacated as moot the district court's order dismissing the complaint for lack of jurisdiction (Pet. App. A17). Petitioner asserts (Pet. 5-6) that the court of appeals could not rely upon that order in determining that there was no jurisdiction to hear the action. As the court of appeals recognized (Pet. App. A4 n.2), however, the vacation of the earlier order did not prevent the district court from reaching the same conclusion on jurisdiction it had reached previously. Moreover, inherent in the court of appeals' opinion on the attorney's fee issue is a determination that the district court's earlier order was correct (see *id.* at A6).

[3]The Court reiterated this standard in *South Carolina* v. *Regan*, No. 94, Orig. (Feb. 22, 1984), slip op. 5-6; *Bob Jones University* v. *Simon*, 416 U.S. 725, 737 (1974); *Commissioner* v. *"Americans United", Inc.*, 416 U.S. 752, 758 (1974); and *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

facts as known to the government at the time the instant suit was filed (as required by *Williams Packing*, 370 U.S. at 7), it cannot be said that there was no basis to support the government's position. The government relied on several revenue rulings in denying petitioner's election to pay the estate taxes in installments.[4] The district court noted that those rulings were "reasonably related" to the purpose of Section 6166 (Pet. App. A15). Indeed, petitioner conceded below that those rulings would bar his election under Section 6166 (Pet. App. A15). In addition, as the district court found, petitioner did not show that he would suffer irreparable injury if he were not permitted to pay the estate taxes in installments (*id.* at A14-A15). In these circumstances, the district court correctly concluded that the *Williams Packing* exception to the anti-injunction statute did not apply (*ibid.*).[5]

c. Petitioner does not appear seriously to challenge the determination that the relief he requested was barred by the anti-injunction statute. Rather, he argues that such a determination was, in reality, a "decision on the merits" (Pet. 7), and that the district court's jurisdiction to determine whether the anti-injunction act applied was itself a sufficient jurisdictional basis to permit it to award attorney's fees under EAJA (*id.* at 8-11). As noted above, however, this Court's decision in *Williams Packing* makes clear

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[4]See Rev. Rul. 75-365, 1975-2 C. B. 471; Rev. Rul. 75-367, 1975-2 C. B. 472; Rev. Rul. 61-55, 1961-1 C. B. 713.

[5]Recognizing that the Commissioner's determination whether or not to allow estate taxes to be paid in installments would not, at least ordinarily, be subject to review, the House Ways and Means Committee proposed to vest declaratory judgment jurisdiction in the Tax Court to review such determinations. See H.R. 4242, 97th Cong., 1st Sess. § 422(d)(1), (1981); H.R. Rep. 97-201, 97th Cong., 1st Sess. 180-183 (1981). That proposal, however, was deleted from the bill as ultimately enacted by Congress (the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 *et seq.*).

that 26 U.S.C. 7421(a) imposes a jurisdictional bar to the consideration of an action such as petitioner's. Moreover, to read the applicable language of EAJA (see page 2, *supra*) as referring simply to the inherent jurisdiction of a federal court to determine its own jurisdiction would render that language devoid of operative significance. As the court of appeals stated, "[i]f Congress had intended the sweeping result which [petitioner] suggests it could have easily done so by providing, for example, for an award of attorneys' fees 'in any court where that action is brought' " (Pet. App. A5). The court of appeals thus correctly honored Congress's decision to make jurisdiction over the underlying action a condition precedent to the award of fees. Indeed, any other result would run afoul of the elementary proposition that without jurisdiction a court is powerless to take any action other than dismissal of the case. See, *e.g., Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868) (When jurisdiction is lacking, "the only function remaining to the court is that of announcing the fact and dismissing the cause.").

At all events, even if that limitation on the scope of the court's authority under EAJA were disregarded, the fact that the anti-injunction statute precludes petitioner from obtaining the injunctive relief he sought in this proceeding would still render him ineligible for attorney's fees under EAJA. While it is no doubt true that a litigant may be considered a "prevailing party" within the meaning of EAJA when a concession by the government renders it unnecessary for the court to enter an order granting the requested relief (see, *e.g., Foster* v. *Boorstin,* 561 F.2d 340 (D.C. Cir. 1977), cited in H.R. Rep. 96-1418, 96th Cong., 2d Sess. 11 (1980)), a case, such as this, in which the court itself is precluded by statute from granting relief stands on an entirely different footing. Thus, notwithstanding the fact that the IRS ultimately honored petitioner's election to pay the estate taxes in question in installments pursuant to

Section 6166 of the Code, we submit that, contrary to the district court's analysis (Pet. App. A10), petitioner was not, and could not have been, a "prevailing party" in this litigation within the meaning of EAJA.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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JULY 1984

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[6]Even if the anti-injunction statute were inapplicable to this case, an award of attorney's fees under EAJA would be inappropriate here on grounds that the court of appeals found unnecessary to consider. First, and wholly apart from the merits of petitioner's claim, the government was "substantially justified" in defending this action on jurisdictional grounds. See 28 U.S.C. 2412(d)(1)(A). Moreover, there are other circumstances that would "make an award unjust" in this case within the meaning of EAJA, 28 U.S.C. 2412(d)(1)(A). It was uncontested that the IRS's ultimate determination that petitioner could elect to pay the estate taxes in installments under Section 6166 was based on additional information that was obtained by the government pursuant to its own discovery efforts herein and that had not previously been made known to the agency by petitioner. Thus, it would appear that any "necessity" to bring this action was of petitioner's own making.

DOJ-1984-07